IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1394 of 2003

Ramesh Milan Das ... Appellant
(Orig.Accused)

V/s

State of Maharashtra
at the instance of Mira Road
Police Station, Thane ... Respondent
(Orig.Complainant)

None appears for the appellant original accused
Smt.V.R.Bhosale,Addl.P.P. for Respondent-State

CORAM:R.M.S.KHANDEPARKAR
AND S.R.SATHE,JJ.
DATED:28th August 2007

ORAL JUDGMENT :- (Per S.R.SATHE,J.)

1. The Appellant-original accused in Sessions Case No.65 of 2002 has preferred this appeal against the judgment and order passed by the 2nd Additional Sessions Judge, Thane whereby the accused was convicted for the

offence punishable under Section 302 of IPC and sentenced to suffer imprisonment for life and to pay fine of Rs.1,000/- in default to suffer simple imprisonment for 3 months.

. Brief facts giving rise to this appeal are as under:-

2. The marriage between Laxmi (deceased in the present case) and the accused took place at Chennai some time in the year 1997. The parents of the deceased were in fact not ready for the said marriage. However, the deceased and accused got married in one temple. After marriage they stayed together at Chennai for a period of one year. Thereafter they shifted to Santacruz Zopadpatti. According to the prosecution at Santacruz, there often used to be quarrel between the accused and deceased. Accused used to show suspicion about the character of the deceased. As a result of the said harassment deceased filed one complaint at Indira Nagar Police Station. Thereafter she started residing along with her mother and sister, at Meera Road. After few days accused went to the house of the deceased and promised that he will not ill-treat her. The mother of the deceased gave amount of Rs.10,000/- to the accused for obtaining a room. Accordingly, the accused secured one room on rental basis and then both of them started residing in the said room. However, accused used to

return home only for 8/10 days in a month. He often used to consume liquor and pick up quarrel with the deceased.

3. On 6-11-2001 the accused was alone in the house and deceased had gone to her sister's house. After some time when deceased went to the house of the accused at about 9-00 a.m., there was quarrel between accused and the deceased. Then again in the afternoon at about 1-15 p.m. there was quarrel and as a result of the same deceased got angered and in the heat of anger she poured kerosene on herself. At that very time the accused lighted cigarette and threw the burning match stick on the person of Laxmi. As a result of the same she sustained burn injuries and started shouting. Within short time her sister and brother reached to the house of the accused. Police were also informed about the incident and then Laxmi was removed to Bhagwati Hospital,Borivali.

4. PSI Abhijit Mohite attached to Meera Road Police Station went to Bhagwati Hospital along with constable and Special Executive Magistrate, Vilas Khade. He recorded the statement of injured Laxmi in presence of SEO Vilas Khade after ascertaining from the doctor on duty that Laxmi is in a position to give statement.

5. In the said statement Laxmi narrated the incident to Police and thereby indicated that accused tried to commit murder after throwing lighted match stick on her person and caused her burn injuries. On the basis of the said statement Police registered offence being CR No.207 of 2001 for the offence punishable under Section 307 of IPC. 6. Injured Laxmi was discharged from the hospital on 27-2-2001 and expired at the house of her sister on 2-12-2002. In the meantime Police had visited the place of offence and panchanama of the place of offence was drawn. At that time they had also attached one note book from the house.

7. On coming to know about the death of Laxmi, Police went to the place and drew inquest panchanama and sent the dead body for post mortem. After post mortem doctor opined cause of death as cardio respiratory arrest due to septicemia due to superficial to deep burns. The Police therefore registered the offence punishable under Section 302 of IPC. Police recorded the statements of various witnesses and after completion of the investigation submitted the charge sheet in the Court of Chief Judicial Magistrate, Thane.

8. Finding that the accused was charge sheeted for the offence punishable under Section 302 of IPC which was exclusively triable by the Court of the Sessions, the

learned Chief Judicial Magistrate, Thane, committed the case to Sessions Court at Thane.

9. The 2nd Additional Sessions judge, Thane framed charge Exh.5 and 9 against the accused for the offences punishable under Section 498A and 302 of IPC.

10. In order to prove the guilt of the accused the prosecution examined as many as 8 witnesses consisting of:-

i. PW1 Vasanti Naidu, sister of deceased Laxmi
ii. PW2 Ramesh Naidu, brother of deceased Laxmi
iii. PW3 P.Kalai Tamilarsu,who translated the contents of the note book.
iv. PW4 Special Executive Officer,Vilas Khade,Exh.29
v. PW5 Pancha witness Narayan,who was present at the time of panchanama of the place of offence and attachment of note book.
vi. PW6 Investigating Officer Abhijit Mohite,Exh.45
vii. PW7 Dr.Gopal Mahajan who had examined the patient and made endorsement on the statement recorded by the Police Officer, Exh.45 and
viii. Dr.Ramchandra Dhotre, who did post mortem on the dead body of Laxmi.

. The prosecution also produced certain documents viz.

the letter written by deceased Exh.20, panchanama of the place of offence Exh.39, panchanama of attachment of book Exh.42, statement of Laxmibai which is treated as dying declaration Exh.49,Inquest panchanama Exh.61 and post mortem notes Exh.55.

11. After considering the evidence adduced by the prosecution, the learned Sessions Judge came to the conclusion that the prosecution has proved beyond reasonable doubt that accused has committed the murder of Laxmi. Naturally, he convicted the accused for the offence punishable under Section 302 of IPC and sentenced him as mentioned above.

12. Being aggrieved by the above mentioned order the accused has filed the present appeal. In this appeal before us on the date of hearing of the appeal none appeared on behalf of the accused. The learned AGP has taken us through the entire evidence as well as the judgment of the learned trial Judge. She submitted that the deceased has given dying declaration wherein she has stated that on the day of incident there was quarrel between her and accused and in the heat of anger she poured kerosene on herself and knowing this, the accused threw lighted match stick on her person and as a result of the same she sustained burn injuries. She also submitted that accused has also made such oral dying

declaration to her sister and brother i.e.PW1 and PW2 and the learned trial Judge has rightly accepted the evidence of dying declaration. She therefore, submitted that the appeal be dismissed.

13. At the outset it must be mentioned that though PW1 Vasanti Naidu, sister of deceased and PW2 Ramesh Naidu, brother of deceased have stated that Laxmi had told them that accused used to show suspicion about her character and on that count there used to be quarrel between them, the evidence in that behalf is scanty. They have also stated that Laxmi had told them that accused often used to consume liquor and used to assault her. However, it must be noted that allegations made by PWs 1 and 2 are vague. There is no specific evidence showing as to when and how the instances of assault or quarrel had taken place. Though it is alleged that once deceased had even lodged the complaint to Police station about the ill-treatment and harassment given to her, the said complaint is not produced by the prosecution. So, there is in fact no cogent and convincing evidence to show that there used to be any serious quarrel between deceased and accused and that accused was ill-treating her.

14. So far as the incident dated 6-11-2001 is concerned, admittedly there is no eye witness to the

incident. Prosecution case solely rests on the dying declaration made by the deceased Laxmi. According to the prosecution there is oral dying declaration made by Laxmi before her sister and brother and there is also written dying declaration which is recorded by the Police Officer Abhijit Mohite.

15. While considering the evidence with regard to the oral dying declaration it must be noted that PW1 Vasanti Naidu has stated that on 6-11-2001 when she went to the house of the accused at about 9-00 a.m. Laxmi told her that there was quarrel between accused and her and accused beat her. However, she has further stated that Laxmi was writing something in a note book and the accused was locked in a room. She has further stated that one minor girl came to her house at about 1-00 p.m. or so and she told her that smoke is coming out of the house of the accused, her brother therefore immediately rushed to the house of the accused and then she followed him. She has stated that at that time Laxmi had sustained burn injuries and she told her that there was quarrel between accused and her and accused assaulted her and as such she got annoyed and poured kerosene on herself. The witness has further stated that at that time laxmi told her that when she poured kerosene on herself accused threw lighted match stick on her person and as a result of the same she sustained burn injuries.

Firstly, it must be noted that even from the evidence of witness Vasanti Naidu it appears that when she reached to the house of the accused several persons had gathered there. Under such circumstances, it was in fact necessary for the prosecution to examine some persons who had gathered there prior to the time PW1 Vasanti reached there. If really such incident, as alleged, had occurred then there was every possibility of deceased Laxmi narrating the said incident to the person who met her for the first time. However, we find that the prosecution has not brought any such independent evidence and on the contrary solely relying on the testimony of sister and brother of deceased who can be called as interested witnesses. Besides this, there are certain other factors in case which go to show that it is not safe to accept the evidence of Vasanti Naidu Exh.7 and Ramesh Naidu Exh.14.

16. PW1 Vasanti has not stated that when she reached there at about 1.15 p.m. accused was seen in the house. PW2 Ramesh says that accused was there but he has not stated there he had any talk with him. If really incident had occurred he would have asked explanation to accused but that has not happened. So his evidence does not inspire confidence.

17. From the evidence of PW2 Ramesh Naidu it appears

that though he reached first to the place of offence Laxmi had not stated anything directly to him. The said witness has stated that his sister Vasanti told him that Laxmi told her that there was quarrel between accused and Laxmi and then Laxmi told her that accused set her on fire. He has also stated that his sister told that accused poured kerosene on her person from the kerosene can and he lighted cigarette and threw the match stick on her person. So, we find that there is discrepancy in the evidence of PW1 and PW2. According to PW1 Vasanti, Laxmi had told her that she poured kerosene herself and accused threw lighted stick while according to PW2 Ramesh Naidu Vasanti told him that accused poured kerosene on her person and set her on fire. So, the evidence of oral dying declaration is not consistent and as such cannot be relied upon.

18. The most important circumstance on which the prosecution is relying is the statement recorded by Police Officer abhijit Mohite Exh.5. The said witness has stated that when he came to know that one woman has sustained burn injuries at the hands of her husband and admitted in the hospital, he went to Bhagwati Hospital and after ascertaining from the doctor that injured is in a position to give statement, he recorded the statement of injured in the presence of SEO Vilas Khade Exh.29 and Dr.Mahajan Exh.48. Firstly, it must be noted

that the said witness has nowhere specifically stated that as to at what time the said statement was recorded. It only shows that it was recorded on the same day on 6-11-2001. Besides this one is at a kiss to know as to why the Police Officer recorded the statement when particularly SEO Khade was available and he was taken to hospital for the purpose of recording the dying declaration of the injured Laxmi. No satisfactory explanation is given about to this circumstance which creates grave doubt about the said alleged written dying declaration Exh.49.

19. It is true that PW4 Vilas Khade, SEO has stated that on that day the Police officer Abhijit Mohite recorded the statement of Laxmi in his presence and he put his signature on the said document for having recorded the statement in his presence. However, if we see the said writing Exh.49 we find that there is nothing on record to show that Khade has signed the said document as a person in whose presence the said statement was recorded. Thus it appears that the signature of Khade must have been obtained on the said document afterwards otherwise there was absolutely no propriety in taking witness Vilas Khade to the hospital on that day. Though it is tried to be suggested that the said statement was also recorded in the presence of Dr.Mahajan the writing does not show any endorsement to

that effect. It only shows that patient was conscious and was in a position to give statement was the endorsement made by Dr.Mahajan. So, the statement recorded by the Police officer or the alleged dying declaration recorded by the Police officer creates grave doubt about the genuineness of the said document.

20. It is needless to say that a conviction can be passed on a dying declaration. It is equally true that there is no rule of law that dying declaration recorded by Police can never be accepted. However, it is well settled that if the alleged dying declaration is recorded by the Police then it should be scrupulously examined. It must be seen as to why the dying declaration was recorded by the Police Officer and not by the Magistrate. It is needless to say that it is the duty of the investigating officer to follow the proper and more reliable method of recording dying declaration of an injured person. In the instant case no explanation is forthcoming as to why the dying declaration was not recorded by the Magistrate. The most important factor to be noted in this case is that incident took place on 6-11-2001. The first statement was recorded by the Police on the same day and thereafter for a period of 50 days the patient was in the hospital. There is absolutely nothing on record to show that during that period she was unconscious or was

not in a position to give statement. On the contrary thereafter she was discharged. So, under such circumstances the investigating officer should have recorded the statement of Laxmibai during those 50 days through the magistrate. But that has also not happened. So, this circumstance also creates serious doubt about the prosecution evidence and indicates that the alleged dying declaration in this case cannot be accepted. It must be noted that in a case **Dalpatsingh Vs State of Punjab AIR 1979 SC 1173,** the Apex Court has categorically observed that better and more reliable methods of recording dying declaration of an injured person should be taken recourse to and one recorded by Police officer may be relied if there was no time or facility available to prosecution for adopting any better method. It is obvious that the present case does not fall in the later category. In the instant case though it was very easy for investigating officer to adopt better course of recording dying declaration that has not been adopted, for the reasons best known to the investigating officer. As a result of this, we have no hesitation to hold that the investigating officer in this case was careless and negligent in carrying out his duty.

21. Incidently it must be noted that in this case admittedly the police officer had taken SEO with him.

Not only that but doctor was also available. So, under such circumstances the dying declaration ought to have been recorded by SEO. If not by him, by the doctor, but that has not happened. So, under such circumstances there is in fact no justification for the police officer to record the dying declaration. For this purpose useful reference can be made to a case **State of Delhi Administration V/s Laxman AIR 1986 SC 250**.

22. The Special Executive Officer Khade has even stated that though he was present he did not ask even a single question to the witness. It has also come on record that witness used to speak in Tamil. One does not know whether there was any person knowing Tamil at the time of recording dying declaration that contents of the same were explained to injured in English. But there is nothing to indicate that injured was knowing English. So, the dying declaration in question surfaces suspicious factors. There is every reason to doubt the correctness and authenticity of the dying declaration in question. So, after careful scrutiny of the entire prosecution evidence on record we have no hesitation to hold that the prosecution has totally failed to prove beyond reasonable doubt that accused has committed the offence punishable under Section 302 of IPC. Reasoning given by the learned trial Judge is not at all legal and correct. The appreciation of the evidence by the

learned trial Judge is faulty. Under the circumstances, it is necessary to acquit the accused for the offence punishable under Section 302 of IPC.

23. Hence we pass the following order :-

i. The appeal is allowed. The order of conviction passed against the Appellant/accused by the 2nd Ad Hoc Additional Sessions Judge,Thane in Sessions Case No.65 of 2002 dated 15-10-2003 is hereby set aside.

ii. The accused be released forthwith, if not required in any other case.

(S.R.SATHE,J.) (R.M.S.KHANDEPARKAR,J.)